NO. 17933

In the
United States Court of Appeals
For the Ninth Circuit

SKOKOMISH INDIAN TRIBE
Appellant,

vs.

E. L. FRANCE, Trustee, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION NO. 1183.

BRIEF OF APPELLEES, FRANCES NALLEY AND PUGET SOUND NATIONAL BANK, AS EXECUTOR OF WILL AND ESTATE OF MARCUS NALLEY, DECEASED

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PRELIMINARY STATEMENT

In this brief, the appellees Nalley (Puget Sound National Bank, as executor of the estate of Marcus Nalley, having been substituted for the appellee, Marcus Nalley) do not purpose to respond to the general arguments of the appellant. Rather, to save repetition, we approve and adopt the general argument as contained in the briefs of the appellees, Hulda S. Carlson, et al.,

and the brief of the City of Tacoma. With one or tw minor exceptions, this brief will be restricted to the issu presented by the effect of the prior state court actio in Mason County.

NATURE OF CASE

In the opening paragraph of appellant's Statemen of the Case (aplt's Br. p. 3) it says that the issue in thi case involves title to the tidelands fronting upon th Skokomish Indian Reservation. With this statemen we agree. It is the only issue. Albeit, the appellant else where in its brief seems to assert that the Indians fishin rights are also involved.

The right of the Indians "to fish at their usual an accustomed stations", as guaranteed by the treaty (Ex 3) was never denied, questioned or put in issue at an time by any of the appellees, during the long tenur of this litigation. If it is established that any "usual an accustomed fishing station" exists upon any of th tidelands in question, these appellees will concede tha the Indians still have a right to go to such station t fish. However, the right to fish at a particular spot doe not give fee title to that spot. *Seifert Bros. Co. v U.S. 249 U.S. 194.*

ARGUMENT

In nineteen of the twenty one subdivision's of appel lant's argument it prefaces each such argument with statement "The trial court did not discuss (or commen upon) this problem". If appellant means that the cour did not discuss each of these arguments orally fron the bench, the statement is probably literally true. I

By this insidious repetition, appellant implies that the Court gave no consideration to these matters, the comment is unjustified.

After the trial of this matter, in December, 1960, the Court asked all of the parties to file briefs. Some months later, after the filing of briefs, oral argument was heard by the trial court. At the conclusion of the oral argument, the court requested each of the parties to file proposed Findings of Fact and Conclusions of Law. The appellant filed its proposed Findings and Conclusions on June 27, 1961 (Tr. 37-82). Roughly six months thereafter the trial court filed its Memorandum Opinion (Tr. 33) and at the same time entered an order directing a final draft of Findings, Conclusions and Decree (Tr. 37). It should be presumed that during this long period the trial court gave full and adequate consideration to any and all of the proposals or issues submitted by any of the parties. The appellant's chagrin with the result should not prompt disparaging innuendoes.

1) *There is no Ambiguity in the Executive Order.*

At page 15 of appellant's brief it argues that there is ambiguity in the legal description fixing the boundaries of the reservation, as contained in the Executive Order. Asserting ambiguity in the legal description as its premise, it then urges in the next succeeding several subdivisions of its argument that all uncertainties should be resolved in favor of the Indians, that the Indians at the time of the Treaty understood they were getting the tidelands, that they needed the tidelands for their sustenance, and that accordingly the tidelands should

be included now within the reservation boundaries. If the premise fails, all of the succeeding argument falls with it.

Largely, appellant's argument concerning ambiguity is concerned with the mouth of the Skokomish River. But the condition of the river, whether broad or narrow, or one or more channels, is not of real significance. The important boundary that we are concerned with is the boundary along the shore of Hood's Canal. Does that boundary stop at high water, or does it extend to low water? It is the area encompassed between those two lines—the tidelands—that we are concerned with. In respect of this area the Executive Order legal description reads:

> ". . . thence east to Hood's Canal; thence southerly and easterly along said Hood's Canal to the place of beginning."

The Executive Order was issued in 1874 (Ex. 4). At that time, and in fact since 1864, the date of the decision in *U.S. v. Pacheco*, 69 U.S. 587, 17 L. Ed. 865, the law of the land was that when a "call" in a legal description reads to a body of water, or along the shore of a body of water, that the boundary is at the high water mark. The act of an executive is presumed to have in contemplation the existing law. There is, therefore, no ambiguity in the legal description of the Skokomish Indian Reservation as contained in the Executive Order. The boundary of that reservation is along the high water mark of Hood's Canal. It does not include the tidelands.

2) *The State Court Action is Res Adjudicata.*

On the previous appeal in this cause, *Skokomish Indian Tribe v. France*, 269 F. 2d 555, the appellees Nalley ontended that a prior action filed in Mason County, Vashington, was Res adjudicata at least as to the Indian tribe and the defendants Nalley. In considering his contention, this court stated at page 559 of that pinion as follows:

> "... If in the further proceedings before the district court it is determined that as to some parcels or some appellees a prior state action involving substantially the same issues is pending, an appropriate order dismissing the action as to such parcels or appellees, or holding the action in obeyance as to them, may be entered."

In the subsequent trial of this action a certified copy the State Court record was admitted in evidence Ex. A-6). This record consists of the Summons and omplaint, Proof of Service upon the Skokomish Indian ribe, and an Order of Default against the Indian tribe, l in the State Court action. That record shows that ne plaintiff in the State Court action, Charles T. Vright, is one of the defendants in this action. It also nows that the appellant herein, the incorporated Skopmish Indian Tribe, Marcus Nalley and wife, and the ity of Tacoma, among others, are all defendants in ne State Court action. So, as to the appellant herein, nd the appellees Nalley and City of Tacoma, they are l parties to the Mason County action.

That portion of the tidelands involved in this suit, nd claimed by appellees Nalley, are the tidelands abutng on Government Lots 3 and 4, Section One, Townnip 21 North, Range 4 West, W.M. (Par. 5 of Admitted

Facts of Pretrial Order, Pretrial Order p. 25-27, Supple mental Transcript). As to the identity of these tideland in the Mason County action, compare paragraph XXXI and XXXIII of the Complaint in that actio (Ex. A-6).

That the issues in both cases were identical, or sub stantially so, compare the prayers of the respective com plaints. In the State Court action the prayer reads, i part (Ex. A-6):

> "1. That the boundaries of the various parcels c tide lands held by the parties hereto and lying i front of, adjacent to, or abutting upon the upland held by the parties hereto be established and pro perly marked.
>
> 2. * * * * *
>
> 3. That the title of the plaintiff and the defer dant [s] respectively be quieted in their respectiv parcels of tidelands in accordance with the bounc aries to be determined and established by th court in this action."

The prayer of the Complaint in the instant caus reads in part as follows (Tr. 5 to 23):

> "1. That this Court quiet title of said plaintiff i and to the above-described lands, and that th defendants herein be forever barred and estoppe from claiming any right or title in and to said lands

See also paragraph XIII of the Complaint here (Tr. 5 to 23).

The trial court in this action made findings to th effect that the appellant and the appellees Nalley an City of Tacoma were all parties to the Mason Count

ction, that as to the defendants, Nalley, the tidelands nvolved in both actions were identical, and that the sues involved in both actions were substantially the ame. (Finding of Fact 39 to 41; Tr. 96-97). On the asis of these findings the court concluded that the Iason County action, having been prior in time to ne present action, was Res adjudicata as between the ppellant and the appellees Nalley, and that as to Nalley ne action should be dismissed. (Conclusions of Law 7 to 19; Tr. 100). There was no contrary evidence, nd of course the record in the Mason County action Ex. A-6) supports the court's findings and conclusions.

The rule in Washington is stated in *Dolby v. Fisher*, Wn. 2d 181, where the court says at p. 189:

> "We can agree with appellant that the general rule is that the plea of *res adjudicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and this regardless of whether the defendant appears and defends or allows the judgment to go by default."

Appellant's argument on this proposition is two-ronged. First, it urges that the Mason County Super-r Court could not oust the Federal Court of juris-iction. That argument misconceives the effect of a lea of *res adjudicata*. That plea does not question the ourt's jurisdiction, but merely asks the court to rule pon that particular plea. This, the District Court did, dversely to the appellant's position.

Second, appellant urges that the Superior Court ha no jurisdiction because the United States was an indis pensible party and was not joined in that suit. This cour held that the United States was not an indispensibl party to this litigation. (p. 560 of the prior opinion) I the United States is not an indispensible party in thi litigation, where these particular parties, these particu lar tidelands, and the issues are identical, it is difficul to know why it would be an indispensible party in th State Court action. The appellant's brief gives no rea sons why there should be a different rule in the tw courts.

The only remaining question concerning this propo sition, is whether the Superior Court for Mason Count had basic jurisdiction over the tidelands involved i that litigation. The only case referred to by appellan on this proposition is *United States v. Candelaria*, 27 U.S. 432, 70 L. Ed. 1023 (Appellant's br. 36). The onl part of the *Candelaria* case which favors appellant, i its holding that a State Court action involving India lands would not be binding upon the United State Government, if it were not a party to the action. Tha question is no longer involved here. Upon the basic ques tion of whether or not the State Court has jurisdictio over Indian lands, *Candelaria* says it does have suc jurisdiction.

In that case two questions were certified by the Ci cuit Court for answer. The second question submitte is as follows (at page 1025 of the Law Ed. Report):

> "2. Did the state court of New Mexico have juri diction to enter a judgment which would be re

judicata as to the United States, in an action between Pueblo Indians and opposed claimants concerning title to land, where the result of that judgment would be to disregard a survey made by the United States of a Spanish or Mexican grant pursuant to an Act of Congress confirming such grant to said Pueblo Indians?"

The court answers this question at page 1027 as follows:

"Coming to the second question, we eliminate so much of it as refers to a possible disregard of a survey made by the United States, for that would have no bearing on the court's jurisdiction or the binding effect of the judgment or decree, but would present only a question of whether error was committed in the course of exercising jurisdiction. With that eliminated, *our answer to the question is that the state court had jurisdiction to entertain the suit and proceed to judgment or decree.* Whether the outcome would be conclusive on the United States is sufficiently shown by our answer to the first question." (emphasis added)

This court has also recognized the basic jurisdiction of a State Court where title to Indian lands is involved, in the case of *Bonds v. Sherburne Merchantile Co.*, 169 Fed. 2d 433; Certiorari denied, 335 U. S. 899, 93 Law Ed. 434. In this case an Indian allottee had mortgaged her allotment. Thereafter the mortgage was foreclosed in a State Court proceeding. Subsequently, the mortgagee also in a State Court, had his title quieted against the Indian allottee. The present action was brought by the Indian allottee in Federal Court to quiet the title to the same allotment. This court held that she could not collaterally attack the State Court judgment, saying at page 437:

> "Nor can appellant in a federal court collateral attack the state court judgment because there we other ground for invalidity of its quieting the tit not presented in that case.
>
> "Appellant was competent to sue in her own rig in the Montana State Court and is not entitled have her case tried anew in this federal proceeding'

See also, *Hutchins v. Pacific Mutual Life Insuran Co.*, 97 Fed. 2d 58 (CCA 9).

CONCLUSION

It is respectfully submitted that the Decree of t trial court should be affirmed.

GORDON, GOODWIN, SAGER & THOMAS
Attorneys for Appellees, Frances Nall and Puget Sound National Bank, as E- ecutor of the Will and Estate of Marc Nalley, deceased.

By HARRY SAGER

I certify that, in connection with the preparation f this brief, I have examined Rules 18 and 19 of the Unit d States Court of Appeals for the Ninth Circuit, and th , in my opinion, the foregoing brief is in full compliar e with those rules.

HARRY SAGER